SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 553

JOSEPH GALLOWAY, BY FREDA GALLOWAY, HIS GUARDIAN, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF.

WARREN E. MILLER,
ALVIN GERLACH,
Counsel for Petitioner.

INDEX OF CASES CITED.

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Respondent, in its brief (B. 4), states the Circuit Court of Appeals held the insured *served an enlistment* in the United States Navy, and *another* in the United States Army, preventing any reasonable inference that he became totally and permanently disabled as alleged. The Court below states that his period of *service* in the Navy and in the Army are such physical facts as to refute any reasonable inference that may be drawn from the evidence that he was totally and permanently disabled as alleged. However, the insured did not "serve an enlistment" in the United States Navy, as those words would imply, because he enlisted for two years (R. 122), and after unsatisfactory service, as testified by Commander Platt (R. 59), he was given a bad conduct discharge (R. 122) in accordance with the sentence

of summary court martial which he received by reason of his conduct during the six months of the enlistment period that he spent in the Navy. It is significant that he served less than one-fourth of his two-year enlistment, and the proper inference to be drawn from this fact is that his abnormal conduct during this six-month period, which prevented him serving this enlistment period, was due to his mental condition.

About three months after entering the Naval Service (January 15, 1920), he left his station and duty without leave, and then, less than three weeks later (R. 124), he again absented himself from his station. As a result of this later infraction of the rules, he was sentenced to the loss of three months' pay and to a bad conduct discharge, but this bad conduct discharge was remitted subject to six months' probation. Notwithstanding such remitting of sentence he was actually given a bad conduct discharge on July 8, 1920 (R. 122). The inference is that his conduct and behavior while on probation were such that the probation was revoked.

Therefore, giving this evidence the reasonable inferences to which it is entitled under the rule laid down in *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721, the short period that the insured spent in the Navy is not such a "physical fact" as to refute reasonable inferences that he was during this period "unable to follow continuously any substantially gainful occupation." The reasonable inference is that the Navy Department would not have discharged him with a bad conduct discharge if he had demonstrated that he could carry on as an enlisted man in the Navy. Considering the other testimony in the case, a reasonable inference to be drawn from the fact that he was not considered by the Navy as a proper person to serve is that the reason for his conduct and incompetence was due to his mental condition, previously established.

The respondent introduced evidence from Lieutenant Klemann, the naval physician who examined the insured at the time he was discharged from the Navy, but who only made a physical examination (R. 115), and not a mental examination. Although this physician stated he found no disabilities, he was asked the following questions, and replied as indicated (R. 115):

"Q. When you say disability, doctor, just what do you mean?

"A. His *physical* condition.

"Q. Do you recall from refreshing your recollection as to just what examination you made of him?

"A. Well you have to make a complete *physical* examination of all men discharged.

"Q. And that was your procedure in connection with your duties as to this sailor?

"A. Yes it was.

"Q. And you found after such examination that Joseph Galloway was not suffering from any *physical* disability?

"A. That is right."

This witness further testified (R. 118, 119):

"Q. And at that time, the examination that you made of him was for the purpose of determining whether or not he had any *physical* disability, is that not true, doctor?

"A. That is right.

"Q. You did not make any tests at that time to determine whether there was any mental impairment?

"A. *I did not, because that is not done.*

"Q. As a matter of fact you have no personal recollection of making the examination at all?

"A. I have not.

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"Q. Doctor is it not possible that he may have exhibited by his conduct at other times, a condition which

would suggest a mental ailment, and not exhibit it at the time that you were examining him?

"A. *That could be possible.*" (Italics supplied.)

The testimony of this witness of the respondent certainly is not conclusive that the insured was not suffering from a mental disability at the time this witness examined him on July 8, 1920, and does not substantiate the position taken by the Court below.

The insured enlisted in the Army December 7, 1920 (R. 124). Captain E. F. Harrison, who examined him (R. 125-126), recorded the results of his "physical examination at place of enlistment," which record of physical examination clearly discloses that no record was made of any *mental* examination of the insured. Based upon a physical examination only, the witness expressed the opinion that the insured was mentally and physically qualified for service. Respondent's failure to call Captain Harrison (R. 125), who based his opinion of the insured's mentality upon a *physical* examination, or to satisfactorily explain at time of trial why he was not called as a witness, involves a well recognized presumption of law that his testimony, if produced, would be unfavorable to the respondent. This is a proper inference under the circumstances. A short time after Galloway's entry into the Service, the exact date not appearing, but prior to January 27, 1921 (R. 126), he was sentenced to be confined at hard labor for a month and forfeit two-thirds of a month's pay because of his conduct. Some time prior to August 6, 1921, the exact date not appearing, he deserted, and on August 6, 1921, he was dropped from the rolls as a deserter. He was away from the Army from some days before August 6, 1921, it may well be inferred, for he doubtless would not be dropped from the rolls the very first day he was absent, until November 1, 1921, when he

surrendered and was returned to military control. For some reason not apparent of record he was restored to duty a week later without trial. It may properly be inferred that unless some compelling reason existed he would have been court martialed for this desertion, but the record is silent as to the reason he was restored to duty without trial. The jury might well infer he was not court martialed because of his mental disability which was shown by the testimony to have existed prior thereto.

Six months later he again deserted (R. 127). Thus it can be seen that the insured only rendered service from December 7, 1920, to some time prior to January 27, 1921, was then confined at hard labor until the end of February, 1921; then after slightly over five months' service, was dropped for desertion, and then served from November 8th to May 6th, a period of less than six months. He did not actually "serve" except a fractional part of his enlistment period, during which time he was twice sentenced by a court martial for misconduct, and, in addition, deserted the service on two occasions.

The only semblance of a work record of the insured from May 21, 1919, to the date of trial, September 10, 1941 (R. 11), a period of over 22¼ years, appears in these few months of service in the Army and Navy. The result of this service as shown by the record supports and sustains the fact that the insured was unable to "follow continuously any substantially gainful occupation." The following remarks of the United States Court of Appeals for the District of Columbia in *United States* v. *Witbeck*, 113 F. (2d) 185, at page 187, are deemed pertinent here:

> "When commitment is not at issue, laymen may testify to sanity or insanity, since "the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are

more or less understood and recognized by every one of ordinary intelligence * * *.[1] Even if he was sane, Witbeck may well have been totally and permanently disabled by the impairment of his mind. We have held that ability to work spasmodically from time to time,[2] or even to work for considerable periods,[3] does not conclusively disprove total and permanent disability within the meaning of a war risk policy."

Respondent, in its brief (B. 38), comments upon the fact that in April, 1919, the insured stated when he was discharged that he had no reason to believe he was suffering from any impairment. As was stated by the United States Court of Appeals for the District of Columbia, in the case of *Cornwell* v. *Cornwell, et al.*, 118 F. (2d) 396, at 398: "One who is in such a mental condition may be entirely unaware of his incapacity."[3a]

The respondent here urges that undue weight be given to the absence of a notation in the veteran's service records of a mental disorder. That is one phase of the evidence but petitioner urges the entire picture should be considered in determining whether substantial evidence has been submitted rather than picking out certain parts of the evidence and unduly stressing any portion of it. Here we have a man who before entering the service (R. 20) was a picture of health and there was nothing wrong with him mentally (R. 20). When he returned from the service (R. 17) he "was

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"[1] Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 619, 4 S. Ct. 533, 28 L. Ed. 536.

"[2] Burgoyne v. United States, 61 App. D. C. 97, 57 F. 2d 764.

"[3] United States v. Stewart, 61 App. D. C. 115, 116, 58 F. 2d 520.

[3a] "George W. Henry, Essentials of Psychiatry (1931) 204: 'Among the greatest obstacles to preventive treatment are the misconceptions on the part of the general public in regard to mental disorders. Most people regard themselves as mentally "normal." They resent or become alarmed at any suggestion that they have characteristics in common with the mentally abnormal.'"

a wreck compared to what he was when he went away'' and his mind appeared to be unbalanced. He would have crying spells, go off and wander with a lot of nonsensical talk and imagine his good friends were talking about him and wanted to injure him. A marked change in his behavior was then shown. This change in behavior is evidence tending to show unsound mind. In *Knapp* v. *St. Louis Union Trust Co., et al.*, 199 Mo. 640, 98 S. W. 70, it is said:

> "A marked change in a person's habits and thoughts is evidence of mental unsoundness. Insanity is indicated by proof of acts, declarations and conduct inconsistent with the character and previous habits of the person. As said by Schouler on Wills (3rd Ed.) p. 103: 'Insanity, to define that word, settles, as we have already indicated, in the opinion of the best medical men, into a comparison of the individual with himself and not with others; that is to say, some marked departure from his natural and normal state of feeling and thought, his habits and tastes, which is either inexplicable or best explained by reference to some shock, moral or physical, or to a process of slow decay, which shows that his mind is becoming diseased and disordered.' ''

In *American National Bank and Trust Company of Chicago* v. *United States*, 104 F. (2d) 783, in considering the question of total and permanent disability, that court stated at page 785:

> "In the consideration of such a question, it is the duty of the court to take that view of the evidence, and all the inferences that may properly be drawn therefrom, most favorable to the plaintiff, and, if the evidence is of such a character that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury. So, too, the admonition of Mr. Justice Holmes, in *White* v. *United States*, 270 U. S. 175, 180, 46 S. Ct. 274, 275, 70 L. Ed. 530, that the rela-

> tion established between the soldier and the government is a 'relation of benevolence established by the government at considerable cost to itself for the soldier's good' ought not to be forgotten, and, of course, it is to be understood that the term 'substantial evidence' is not to be used in the sense of reliability, but rather in contradistinction to the term 'scintilla of evidence.' *United States* v. *Tyrakowski* (7 Cir.), 50 F. (2d) 766, 770. It is with these principles in mind that the question must be determined."

The insured's condition before the lapse of the policy and in subsequent years have significance only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy. (*Carter* v. *United States* (C. C. A. 4) 49 F. (2d) 221.)

Respondent, in its brief, takes the position (B. 7) that even if the insured did become totally disabled by reason of insanity while his policy was in force, the lack of evidence from 1922 to 1930 constitutes a fatal deficiency in petitioner's proof. The court below likewise said (R. 141) the lack of evidence over a period of years between the insured's "last discharge"[4] from the Army and the appointment of a guardian constituted a "failure in appellant's case."

The insured, it will be observed, was never apprehended after his desertion from the Army in 1922. It is only reasonable that a person with the status of a deserter at large from the United States Army, whose mind was in the condition of that of this insured, would absent himself from those with whom he would usually associate because of fear

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[4] The court below is wrong in this, as the insured was not discharged from his second Army enlistment, and so far as the records show, he is still carried as a deserter. He was dropped from the rolls as a deserter (R. 127) but there appears in the record nothing to show he was ever discharged.

of apprehension and punishment. His mental condition, admitted by both the court and the respondent, at the time of trial to have existed to such a degree that he was then permanently and totally disabled, clearly shows that he could not have testified at the trial of the case. A lack of testimony from 1922 to 1930 is thus explained, and the jury could well infer that only the then admittedly insane insured was in a position to know where he was and what he was doing during these years; as he had lost his mental faculties, the reason for a lack of proof during these years is apparent. The record shows (R. 88) that when he was examined in 1931 he stated he did not remember being in the service and deserting in 1922.

There is ample evidence here to show that the insured was insane prior to 1922 (R. 98, 17, 27, 29, 96, 97, 50, 52, 56). Insanity, being proved, is presumed to continue. (*Wray* v. *Wray*, 33 Ala. 187; *Duffield* v. *Robeson*, 2 Har. (Del.) 375; *Cook* v. *Cook*, 53 Barb. (N. Y. 180.)

Mental unsoundness, once established, is presumed to continue. (*Waters* v. *Waters*, 207 N. W. 598, 201 Ia. 160; *Fendler* v. *Roy*, 58 S. W. 459, 331 Mo. 1083; *In re Kelher* (C. C. A. 2), 159 Fed. 55.)

These decisions are in accordance with the recognized principle of law that once the existence of a condition has been shown it will be presumed, in the absence of a showing to the contrary, to continue. Here, in addition to the presumption of law applicable to the eight years for which there is no direct testimony, during which it is presumed that the insured's mental condition continued as previously shown by his behavior, we have a definite condition of total and permanent disability by reason of insanity, recognized by the court below to have existed since February 11, 1932 (R. 141) and recognized by respondent to have existed at the time of trial (B. 7).

Considering all the circumstances here, the insured's station in life, a laborer (R. 125), his desertion from the Army, the fact that he is apparently still carried as a deserter on the Army Rolls, and a reward having been available to anyone who might inform Army authorities of his whereabouts in order that he might be apprehended as such deserter, his mental condition as shown before and immediately after this period—considering these facts together with all the other facts in the case, it is respectfully submitted that in this case the inability of petitioner to supply direct evidence does not constitute a fatal deficiency in petitioner's proof.

> "The phrase 'total permanent disability' is to be construed reasonably and having regard to the circumstances of each case. * * * The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules or formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others." (*Lumbra* v. *United States*, 200 U. S. 550, 78 L. Ed. 492.)

The cases cited by respondent in its brief in support of its position, and by the court below, differ factually from the instant case, and are readily distinguished from the situation existing here. In the case of *United States* v. *LeDuc*, 48 F. (2d) 789, cited by counsel and also mentioned by the court below, the insured, who was suffering from a physical disability, tuberculosis, passed different physical examinations.

Respondent, in its brief, challenges the sufficiency of the expert opinion testimony given by Dr. E. M. Wilder, which testimony is based upon facts admitted in evidence. Petitioner's position is that Dr. Wilder's testimony constituted substantial evidence, and that the court below did not give

to it the consideration to which it was entitled, in holding there was no substantial evidence in this case sufficient to submit the case to the jury.

A qualified physician, assuming the facts as established by other testimony in the case as true, is competent to give an expert opinion as was done here. (*United States* v. *Cannon* (C. C. A. 1), 116 F. (2d) 567; *United States* v. *Aspinwall*, 96 F. (2d) 867; *Asher* v. *United States*, 63 F. (2d) 20; *United States* v. *Fulkerson*, 67 F. (2d) 288.) [5]

Respondent states there is no evidence of the permanency of the insured's condition, which existed prior to May 25, 1919 (B. 40). However, it is respectfully submitted that when considering the evidence as a whole, the testimony of the witnesses who personally observed the insured, and the medical testimony, there is ample evidence apparent in this record from which the jury could properly find that the insured's condition, as it existed prior to May 25, 1919, was permanent. John Tanikawa, who observed the insured while his policy was in force, and in 1936, testified (R. 48) that in 1936 "he was not all there," and appeared the same as he did when the witness observed him in France. The continuation of this disability over this long period of time, now admitted by both the court below and respondent in its brief to be permanent, is evidence of its permanency. (*McGovern* v. *U. S.*, 294 Fed. 108, aff. 299 Fed. 302, cert. den. 267 U. S. 608.)

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[5] See also: *United States* v. *Messinger* (C. C. A. 4) 68 F. (2d) 234; *United States* v. *Jensen* (C. C. A. 9) 66 F. (2d) 19; *United States* v. *Sorrow* (C. C. A. 5) 67 F. (2d) 372; *United States* v. *Polley* (C. C. A. 7) 67 F. (2d) 598; *United States* v. *Ellis* (C. C. A. 5) 67 F. (2d) 765; *United States* v. *Lynch* (C. C. A. 5) 67 F. (2d) 835; *Meyer* v. *United States* (C. C. A. 5) 65 F. (2d) 509; *LeBlanc* v. *United States* (C. C. A. 5) 65 F. (2d) 514; *United States* v. *Dudley* (C. C. A. 9) 64 F. (2d) 743; *United States* v. *Francis* (C. C. A. 9) 64 F. (2d) 865; *United States* v. *Thomas* (C. C. A. 10) 64 F. (2d) 245.

Contrary to respondent's contention, it is believed that the facts here are stronger for the petitioner than those which existed in the case of *Halliday* v. *United States* (315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. 393). Here, as in the *Halliday* case, the insured was normal and healthy before he entered the service, but upon being discharged a marked change in his habits, demeanor and conduct was observed (R. 17, 18, 19, 21, 27, 30, 39, 42, 96, and 97). In the *Halliday* case, this Court stated there was evidence of mental disability for fifteen years. Here, such evidence appears from 1918 to 1941, a period of over twenty-two years.

A witness testified in the *Halliday* case, and in the instant case (R. 48), that the insured's condition was the same after the policy lapsed as before.

In the *Halliday* case, numerous medical examinations, considerably more than are here present, were made by government doctors, the reports of which tended to controvert Halliday's claim of total and permanent disability.

In the *Halliday* case, this Court, in commenting upon the unfavorable inferences the jury was entitled to draw from the failure of Halliday to take medical treatment, said:

> "There can be no doubt that evidence of the failure of attempted treatment would have been highly persuasive of the permanence of petitioner's disability. And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. However, this was but one of the many factors which the jury was free to consider in reaching its verdict. In the fact of evidence of a mental disorder of more than 15 years duration, it can hardly be said that the absence of this single element of proof was fatal to petitioner's claim. Moreover, inferences from failure to seek hospitalization and treatment must be drawn with the utmost caution in cases of mental disorder, where, as here, there is reason to believe that one of the

manifestations of the very sickness itself is fear and suspicion of hospitals and institutions."

Here, instead of a failure on the part of insured to take hospital treatment, respondent is complaining of the absence of evidence for a period of over eight years. The reason for this is adequately explained by the fact that the insured did not remember being in the service and deserting in 1922 (R. 88) and the further fact that insured did not testify because he was unable to do so due to his mental condition. It is petitioner's position that this was but one of many factors which the jury should have been allowed to consider in reaching its verdict, and the Halliday opinion supports petitioner's position here.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

ALVIN GERLACK,
Los Angeles, California;
WARREN E. MILLER,
Washington, D. C.,
Counsel for Petitioner.